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No. 85-828

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and
RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should the Court grant review of an order which by its terms expired on August 31, 1985, and although extended for two years by the district court, is presently subject to three separate challenges in the courts below, any one of which may render review by this Court unnecessary?

2. May a district court order race-conscious relief to class members under Title VII to undo the effects of past discrimination and to prevent continuing discrimination based on specific findings of (i) past and continuing intentional discrimination, (ii) continuing classwide harm, and (iii) lack of a bona fide seniority system?

3. May a district court order race-conscious relief to class members under 42 U.S.C. §1981 to undo the effects of past discrimination and to prevent continuing discrimination based on specific findings of (i) past and continuing discrimination, (ii) continuing classwide harm, and (iii) lack of a bona fide seniority system?

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BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This is a case in which the courts below have repeatedly found past and continuing intentional racial discrimination by Local Union 542 of the International Union of Operating Engineers ("Local 542" or "the Union") against a class of minority

operating engineers and applicants to the trade. The Union's pattern and practice of discrimination is long-standing and has taken (and in many respects still takes) a variety of forms: violence, exclusion, segregation and job denials. However, the principal means by which Local 542 has effectuated its discrimination is through manipulation of its referral system.

Having been held liable for violating both Title VII and Section 1981, the Union was ordered by the district court to desist its violations of plaintiffs' rights and to gradually provide class members, over the course of a phased-in five year injunction, with equal employment opportunity. Despite the time afforded it to comply with the law, Local 542 refused to abide by the district court's injunction, thereby causing qualified class members to lose several hundred thousand hours of work and millions of dollars in wages. As a result, just several months ago, the district court held Local 542 in contempt and extended the injunction, which expired on August 31, 1985, for two more years.[1]

On these facts Local 542 would have this Court review the decision of the Court of Appeals for the Third Circuit which held, as has every other court of appeals that has ruled on the subject, that race-conscious remedies are an appropriate form of equitable relief for federal court enforcement of the Nation's equal employment opportunity laws. Whatever the merits of that issue in other contexts,[2] review of the question here is not warranted.

ORDERS AND OPINIONS BELOW

Omitted from Local 542's statement of the case and from its Appendix is any reference to the district court's order of July 30, 1985 which extended for two more years the five year injunction which had been issued against the Union. Also omitted by Local

1. Litigation over the extension and the contempt citation is pending in the courts below. For that reason, the case is not ripe for review. In addition, since the order sought to be reviewed has expired, the Writ also should be denied on grounds of mootness. *See* Argument I, *infra*.

2. *See, e.g., Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *cert. granted*, 106 S.Ct. 59 (1985) and *E.E.O.C. v. Local 638 . . . Local 28 of the Sheet Metal Workers' International Association*, 753 F.2d 1172 (2d Cir. 1985), *cert. granted*, 106 S.Ct. 58 (1985).

542 is any reference to the district court's order and memorandum of October 9, 1985 which, *inter alia*, (i) held the Union in contempt of the court's referral, hours and validation requirements, (ii) appointed a Monitor to run Local 542's hiring halls, and (iii) extended for the duration of the injunction the race-conscious referral goals that the court deemed necessary to prevent further violations of plaintiffs' rights by the Union. These orders and the memorandum opinion of October 9, 1985 are appended to this brief.

STATEMENT OF THE CASE

This lawsuit, challenging a pattern and practice of racial discrimination by Local 542, is now more than fourteen years old.[3] As pertains here, the Union was found liable in 1978, under both Title VII and Section 1981, for having operated its hiring hall system to deny entry and jobs to qualified minority operating engineers. *Pennsylvania v. Local Union 542*, 469 F. Supp. 329 (E.D. Pa. 1978) (liability opinion), *aff'd. as to Local 542*, 648 F.2d 922 (3d Cir. 1981) (*en banc*), *separately aff'd. by an equally divided court as to defendant contractors*, 648 F.2d 923 (3d Cir. 1981) (*en banc*), *rev'd. as to defendant contractors sub nom. General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982).

3. Local 542 deliberately delayed the litigation for a number of years. Early on in the lawsuit, Union officials led groups of white operating engineers in unprovoked attacks against several named and class plaintiffs in an effort to dissuade prosecution of the suit. *See* 347 F. Supp. 268 (E.D. Pa. 1972), *aff'd. mem.* 478 F.2d 1398 (3d Cir. 1973). Once discovery was underway, Local 542 denied and concealed relevant evidence from plaintiffs, causing the district court, on eight separate occasions, to issue discovery orders and sanctions against it. On the eve of trial, Local 542 filed a baseless recusal motion against the district court judge in an effort to delay the case even further. *See* 388 F. Supp. 155 (E.D. Pa. 1974), *mandamus denied* No. 74-2281 (3d Cir. 1974), *cert. denied*, 421 U.S. 999 (1975). Finally, once trial began, the Union's prior counsel deliberately delayed its completion, causing the district court to hold him in criminal contempt on two separate occasions. *See* 73 F.R.D. 544 (E.D. Pa. 1976) (first contempt citation), *supplemented*, 73 F.R.D. 551 (E.D. Pa. 1976) (second contempt citation), *aff'd.*, 552 F.2d 498 (3d Cir. 1977), *cert. denied*, 434 U.S. 822 (1977).

In adjudicating Local 542's liability, the district court found that the Union's practice of discrimination against minorities was classwide and intentional. It also found that the Union's hiring hall system, though purporting to be a bona fide seniority system, 469 F. Supp. at 342, was "not bona fide in structure." *Id.* at 381. These findings were upheld on appeal, 648 F.2d 922 (3d Cir. 1981) (*en banc*), and were not subsequently challenged in this Court.

In 1979 the district court issued a five year injunction designed to remedy and prevent the recurrence of discrimination by Local 542. *See* 502 F. Supp. 7 (E.D. Pa. 1979) (Judgment and Decree); 488 F. Supp. 988 (E.D. Pa. 1980) (opinion in support of Judgment and Decree). The injunction, which did not take effect until September 1, 1980 and which did not provide plaintiffs with full make-whole relief until years four and five, contained goals for minority integration, referrals, and hours worked. 488 F. Supp. at 993. As all parties recognized, these goals were absolutely necessary since "[t]here is simply no other way, given the circumstances of this case, to effectively remedy the discrimination found here." *Id.*[4]

Following this Court's decision in 1982, 458 U.S. 375, the injunction was revised by the district court to remove the contractor class from the case and to place the full responsibility for compliance on Local 542. App. at 253a *et seq*. As revised, the injunction required the Union, by use of its referral system, to provide minorities with a non-discriminatory share of operating engineers work. It did so by linking the minority referral rate to the hours the parties agreed minorities should work absent a process of racial discrimination by Local 542. App. at 258a-260a (*see* ¶¶12-14).

The Union took no appeal from the revised injunction. But neither did it provide minorities with the amount of work to which they were entitled under its terms. Consequently, in March 1984, plaintiffs moved the district court to increase the minority referral goals to prospectively ensure compliance by the

4. The injunction was affirmed as to Local 542, 648 F.2d 922 (3d Cir. 1981) (*en banc*), and was not further challenged by the Union in this Court.

Union with the minority hours goals of the injunction. Local 542 never responded to this motion, and on July 24, 1984 the district court granted, in part, plaintiffs' prayer for relief. App. at 14a *et seq*. (Post Decree Order #78 and accompanying memorandum opinion).[5]

A week later the union filed a motion for reconsideration of the new minority referral goals, contending that the decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) required their termination as well as termination of the injunction's minority hours goals.[6] The district court denied the motion (App. at 80a), and on appeal the Third Circuit affirmed. (App. at 1a-13a).

A. Basis For The Third Circuit's Decision

The Third Circuit distinguished *Stotts* on three grounds.[7] First, it held that unlike *Stotts* this case involved a judicial finding of intentional racial discrimination. This was deemed decisive since race-conscious remedies are permissible forms of relief to redress past discrimination and prevent its recurrence. App. at 8a-9a. *Accord Regents of University of California v. Bakke*, 438 U.S. 265, 307-310 (1978) (Powell, J.).

Second, "and perhaps more importantly" (App. at 9a), *Stotts* involved a bona fide seniority system; here, however, the seniority system was explicitly found to be not bona fide; indeed, it had been used intentionally by Local 542 to deny entry and jobs to qualified minority operating engineers. App. at 9a. As a

5. The district court increased the minority referral goal to 40% in the Philadelphia area and to 17% in the State of Delaware (App. at 14a), the two regions in Local 542's jurisdiction in which nearly all the Union's minority members reside.

6. The Union's reconsideration motion also sought approval of what Local 542 called "controlled solicitation", a concept under which union members could seek work outside the hiring hall system. Plaintiffs opposed the request solely because Local 542 would not accept responsibility for any minority shortfalls that resulted from implementation of "controlled solicitation."

7. Separately, it rejected Local 542's appeal from that portion of the district court's order which denied the Union's request for "controlled solicitation." *See* n. 6, *supra*. Review has not been sought here by Local 542 of that question.

result, non-minorities, who were the direct beneficiaries of Local 542's illegally-run hiring hall, had no right to seek or expect judicial protection of their "illegitimate" entitlements at the expense of qualified minorities. App. at 9a-10a.[8]

Finally, pointing to the Union's liability under Section 1981, the Third Circuit held that any constraints on a district court's remedial power that might exist under Title VII, *e.g.* §706(g), 42 U.S.C. §2000e-5(g), did not constrain, beyond the limits of otherwise applicable equitable considerations, the district court's remedial power under the 1866 Civil Rights Act. App. at 10a, *citing, inter alia, N.A.A.C.P. v. Detroit Police Officers Ass'n.*, 591 F. Supp. 1194, 1202-1203 (E.D. Mich. 1984).

B. Subsequent Developments

The district court's order upheld by the Third Circuit, Post Decree Order #78 (App. at 14a), expired on August 31, 1985, the same date the injunction in this case was due to expire. It is expired Post Decree Order #78 which Local 542 challenges in its certiorari petition. However, because Local 542 was adjudicated in contempt of court, the district court extended the injunction and Post Decree Order #78 for two additional years. *See* orders of July 30, 1985 and October 9, 1985, copies of which are appended to this brief.

The district court's contempt citation was predicated on its finding that Local 542 "fail[ed] to satisfy court mandates respecting work levels for minorities, as well as its failure to do validation work." Appendix B, *infra* at 10a. In support of that finding, the court calculated that the Union refused to give class members hundreds of referrals to which they were entitled under Post Decree Order #78, at a cost to them in wages of approximately $4,101,727.00. *Id.* at 6a, *infra*. It also found, "in blatant and confrontational contempt of [ ] court mandates, [Local 542] has failed to do *any* of the validation work required of it." *Id.* at

8. At a contempt hearing held this past spring, Local 542's own expert agreed. He testified that whites who received their jobs through discrimination might be dismissed and replaced by qualified minority employees. *See* Tr. of hearing held on April 17, 1985, at 111-112 (testimony of Dr. Edward Lusk).

10a, *infra*. "Emphasis in original." Characterizing Local 542's efforts as "mediocre, lackluster and, in the Court's view, calculated to show the minimum of change at the least cost to the Union's continuous program of wearisome and intentional discrimination", *id*. at 10a-11a, *infra*, the district court, *inter alia*, appointed a Monitor to run the Union's hiring halls and a testing expert to perform its validation duties. *Id*. at 13a-14a, *infra*. Furthermore, to provide minorities with the work denied them by Local 542, the court continued the minority hours goals of the injunction and the referral goals of Post Decree Order #78 for the additional two years the injunction was to remain in effect. *Id*. at 12a-13a, *infra*.

In response to these rulings, Local 542 filed two separate appeals to the Third Circuit. The first, filed on August 29, 1985, challenges the district court's order extending the injunction for two more years. That appeal has been docketed at No. 85-1540. The second, filed on November 9, 1985, challenges the order adjudicating the Union in contempt and providing plaintiffs with continued race-conscious relief in referrals. That appeal has been docketed at No. 85-1706. In addition to these appeals, Local 542, three days after filing its second appeal, moved the district court to reconsider the contempt citation and the order extending the minority referral goals for the duration of the life of the injunction.

Neither of the foregoing appeals, nor the Union's motion for reconsideration in the district court, has yet been adjudicated.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD NOT BE GRANTED SINCE THE ORDER CHALLENGED HERE HAS EXPIRED AND THE ORDERS EXTENDING THE INJUNCTION ARE BEING CHALLENGED BY LOCAL 542 IN THE COURTS BELOW

This Court does not sit to consider moot or premature cases. *DeFunis v. Odegaard*, 416 U.S. 312, 316-320 (1974) (mootness), *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268,

284 (1969) (Prematurity). Yet, this is precisely what Local 542 would have the Court do if certiorari were granted.

On the one hand, the district court order being challenged here, Post Decree Order #78, App. at 14a-15a, has now expired. By its terms, it prescribed minority referral goals for the balance of Decree year four and all of Decree year five. Decree year five ended on August 31, 1985. That event acts to moot consideration of Post Decree Order #78 by this Court.

On the other hand, while the minority referral goals of Post Decree Order #78 were extended by virtue of the district court's order of October 9, 1985 (Post Decree Order #87, App. B, *infra* at 2a), Local 542 has mounted three separate challenges to their extension in the courts below. These include two appeals pending in the Third Circuit and a motion for reconsideration pending in the district court. Success by the Union on any one of these fronts may render review of the underlying issues unnecessary in this Court. In any event, they do not present issues ripe for review at this time.

II. THE RACE-CONSCIOUS REFERRAL GOALS UPHELD BY THE COURT OF APPEALS WERE NECESSARY TO REDRESS PAST DISCRIMINATION BY LOCAL 542 AND TO PREVENT CONTINUING VIOLATIONS OF PLAINTIFFS' RIGHTS

It is well settled that when intentional race discrimination has been found, courts not only have the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977), *Louisiana v. United States*, 380 U.S. 145, 154 (1965). This is true regardless of whether the violation is based on Title VII, Section 1981 or the Constitution. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946).

The race-conscious minority referral goals upheld here by the Third Circuit are fully consistent with these remedial principles. On the one hand, they are intended to overcome years of

past intentional discrimination that has caused qualified minorities to be deprived of their livelihoods as operating engineers. In this respect, the referral goals of Post Decree Order #78 were set at the percentages necessary to provide minorities with the amount of work they should have received absent a process of systematic discrimination by Local 542.

On the other hand, in light of the recent finding that the Union "has continued to use the hiring hall as a tool of discrimination" (App. B, *infra* at 9a), at a cost to minorities in excess of $4,000,000.00 during the last two years Local 542 was subject to the court's decree (*id.* at 6a), these goals were absolutely necessary to counteract continuing discrimination by the Union.[9] Clearly under the circumstances present here, nothing in either Title VII or Section 1981 prohibits the kind of race-conscious relief ordered and upheld by the courts below.

A. Title VII

The primary objective of Title VII has always been prophylactic — to achieve equal employment opportunity and to remove the barriers that have traditionally operated to favor non-minorities over other employees. *Teamsters*, *supra*, 431

9. One aspect of this continuing discrimination is Local 542's practice of providing whites with far more lucrative referrals than it provides to minorities. In the fourth year of the injunction, for example, the Union referred whites to jobs that lasted nearly three times as long as those given to minorities. *See* Affidavit of Dr. Bernard R. Siskin at ¶14, submitted in the district court in support of Plaintiffs' Brief in Opposition to Local 542's Motion for Reconsideration of Post Decree Order #87 (filed December 13, 1985). As a result, the record shows that though whites constitute 84.8 percent of the Union's membership in District 1, by the fifth year of the injunction they were working 86.14 percent of the hours. *Id.* at ¶17. Until job lengths per referral are equalized between whites and minorities, a higher minority referral rate is necessary to offset current referral discrimination by Local 542.

In addition, Local 542 has blatantly defied the "conservative" integration goals of the district court's injunction, 469 F.Supp. at 351. As a result, minorities still do not constitute a fair share of the Union's membership even though Local 542 was given five years to integrate itself. Under Local 542's proposal, the minority referral percentage would be directly linked to the percentage of minorities in the Union. Clearly, however, that would only serve to reward Local 542 for refusing to admit new minorities as ordered by the district court.

U.S. at 348. Accordingly, in the remedial provision of Title VII, §706(g), "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to secure complete justice." *Albemarle*, *supra*, 422 U.S. at 418, *quoting Brown v. Swann*, 10 Pet. 497, 503 (1836). In pertinent part, §706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate*. (Emphasis added).

42 U.S.C. §2000e-5(g). Viewed in light of the historical purposes of Title VII, Section 706(g) always has been construed to allow for race-conscious remedies to eradicate the effects of intentional discrimination, past or present. *See generally United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In addition to the Third Circuit, each court of appeals which has considered the question has so held. *See, e.g., Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *E.E.O.C. v. Local 638*, *supra* , *Diaz v. American Telephone and Telegraph Co.*, 752 F.2d 1356, 1360 n. 5 (9th Cir. 1985).

Race-conscious remedies have been prohibited under Title VII only when they unnecessarily trammel the interests of white workers. *Weber*, *supra*. This is the case, for instance, where they would divest white workers of legitimate expectations based upon bona fide seniority systems. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), *Teamsters*, *supra*.

That exception clearly is not present here. Unlike the situation in *Stotts*, where the union's seniority provision was entirely bona fide, Local 542 has utilized its hiring hall to discriminate against minorities. As the district court recently found, it continues to do so. App. B., *infra* at 9a-11a. As such, Local 542's referral (i. e. seniority) system was found by the

courts below not to be bona fide. *See* 469 F. Supp. at 381. It thus finds no protection under Title VII. *Teamsters*, *supra*, 431 U.S. at 353-6.

When seniority systems like the one at issue here are not bona fide, the expectations of workers who derive benefits from those systems are not legitimate and not entitled to the protection of Title VII. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774-779 (1976). The Court of Appeals so held (App., at 9a-10a) and, accordingly, distinguished *Stotts* on that ground.[10] Local 542's arguments to the contrary do not merit the Court's attention.[11]

B. SECTION 1981

Quite apart from its determination that Title VII authorized the minority referrals goals upheld here, the Court of Appeals found, given the district court's well supported and irrefutable findings of intentional discrimination, that such a remedy was independently justified under 42 U.S.C. §1981. App. at 10a. As the Third Circuit correctly observed, §1981 is not circumscribed

10. The Court of Appeals also correctly recognized that *Stotts* is not controlling here for another reason. In *Stotts*, there was no judicial finding of discrimination and no admission of wrongdoing. Here, by contrast, after lengthy litigation the district court found that Local 542 had indeed been guilty of intentional discrimination. The courts of appeals have been unanimous in their refusal to extend *Stotts* to cases in which intentional discrimination has been judicially found. *E.g. Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *E.E.O.C. v. Local 638*, *supra*. *See also N.A.A.C.P. v. Detroit Police Officers Ass'n.*, 591 F. Supp. 1194 (E.D. Mich. 1984).

11. The Union also urges the court to invalidate the minority referral goals because they benefit minorities who were not actual victims of discrimination. Even if, despite overwhelming precedential authority to the contrary, the Court were to accept such a view, it would not benefit Local 542. This is because the factual predicate of its argument is simply incorrect. The entire class of minorities involved in this case was held to be victimized by the Union's systematic discrimination. 469 F. Supp. at 388. Therefore, the whole class was entitled to non-discriminatory make-whole and preventive relief. Moreover, in light of the district court's recent finding of continuing discrimination, it is clear that each class member affected by the court's injunction was in need of the referrals remedy to prevent further violations of his rights.

by §706(g) or its equivalent. *Id.* Thus, insofar as §1981 is concerned, the district court's remedial powers are checked only by traditional principles of equity under which race-conscious plans are a well established means to correct past intentional discrimination and to prevent its continuation or recurrence. *See, e.g., Bratton v. Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981), *cert. denied sub nom. Novack Investment Co. v. Setser*, 454 U.S. 1064 (1981), *Local Union No. 35 v. Hartford*, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

Local 542 urges the Court to disregard this substantial body of case authority and the factual exigencies which led to its development. The Union seeks from this Court not only an invalidation of the remedy upheld in this case by the Court of Appeals, but as well the prohibition of all race-conscious remedies designed to redress violations of §1981.

Local 542's argument for such a radical departure from established jurisprudential principles is primarily based on the notion that race-conscious remedies were never contemplated by the 39th Congress which enacted §1981 in 1866.[12] However, the idea that §1981 must be constrained by the social reality of the post-Civil War era has been rejected by the Court on prior occasions and need not be re-addressed now. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976), *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), *Jones v. Alfred H.*

12. Local 542 further suggests that the legislative history of Title VII, which at least in its view evidences an intent not to allow goals and quotas, should be imputed to §1981 regardless of the intent of the 1866 Congress, and regardless of the distinct identity of §1981 as a guarantee against employment discrimination. This argument need not detain the Court since it is clear that Title VII did not supersede, implicitly or otherwise, the rights and remedies available under §1981. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (approving §1981 as an independent remedy for employment discrimination). *Accord Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974), *Brady v. Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972), *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *See also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (repeals by implication are not favored).

Mayer Co., 392 U.S. 409 (1968). As the Court has recognized, §1981 was never intended to operate in a vacuum, and the intent of its framers cannot be accurately perceived by removing it from the comprehensive constitutional and legislative scheme of which it was part and parcel. The purpose of that scheme was to eliminate badges and incidents of slavery, however and whenever they might manifest themselves. With that in mind, this Court has consistently construed §1981 and its companion provision, 42 U.S.C. §1982, as ideals of racial equality capable of growth and continuing vitality. Those provisions have, in fact, been utilized to eliminate modern vestiges of discrimination which in 1866 were "natural" facts of life. *See, e.g., Runyon v. McCrary, supra* (prohibiting discrimination in privately operated schools), *Tillman v. Wheaton Haven Recreation Ass'n.*, 410 U.S. 431 (1973) (prohibiting discrimination in privately run public accomodations), *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (prohibiting discrimination in private contractual relationships). *See also McDonald v. Sante Fe, supra* (extending §1981 protection to whites, despite focus on blacks in 1866).

This case illustrates better than most that modern vestiges of slavery pose the same impediments to equality that Congress tried to eradicate in 1866 through its passage of §1981. The district court has found that Local 542 has intentionally excluded minorities from its ranks and denied them jobs, solely on the basis of their race. Under similar circumstances, where intentional discrimination has posed a like impediment to minority opportunity, the federal courts have unanimously approved race-conscious remedies under §1981 of the type unheld here by the Court of Appeals. *See*, e.g., *Bratton v. Detroit, supra*, *Setser v. Novak, supra*. To reverse this trend, as Local 542 urges the Court to do, would serve to freeze the status quo of discrimination to the perpetual disadvantage of minority workers. Such an argument does not merit consideration by this Court.

CONCLUSION

For the reasons stated, the Writ should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, *et al.*	:	
vs.	:	Civil Action No. 71-2698
LOCAL UNION 542, et al.	:	

ORDER

BEFORE Bechtle, J.

AND NOW, this 30th day of July 1985, it is ORDERED that, following a hearing held this day in open Court, the Consent Decree which was previously entered into in the above-captioned action is hereby extended for a period of two (2) years from August 31, 1985 pending further modifications to be made by the Court.

ENTERED: 7/31/85
CLERK OF COURT

ATTEST: or BY THE COURT:

BY:_____ _____
Deputy Clerk Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, *et al*	:	CIVIL ACTION
V.	:	
LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al*	:	No. 71-2698

POST DECREE ORDER #87

AND NOW, TO WIT, this 9th day of October, 1985, for the reasons stated in the accompanying Memorandum, attached hereto as Exhibit "A", IT IS ORDERED that the Judgment and Decree, as revised in Post Decree Order #73 is hereby modified in accordance with the Modification Decree, attached hereto as Exhibit "B".

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, *et al*	:	CIVIL ACTION
V.	:	
LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al*	:	No. 71-2698

MEMORANDUM

Following a hearing held on July 30, 1985, this court ordered that the "Judgment and Decree" originally issued by this court on November 7, 1979, as revised on August 12, 1983 (Post Decree Order #73), which was to expire on August 31, 1985, be extended for two years. After a review of the Special Master's Report, and the exhibits and arguments propounded by the parties, the court finds it necessary to make certain modifications to the Judgment and Decree.

I. FACTS

The facts of this prolonged litigation have previously been articulated by this court. *See Commonwealth of Pennsylvania v. Local 542*, 569 F.Supp. 582, 583-86 (E.D. Pa. 1983). A brief summary of the facts, however, is in order.

This action was instituted on November 8, 1971, by 12 black men and the Commonwealth of Pennsylvania. It challenged a pattern and practice of racial discrimination against minorities, as a class, by Local 542, International Union of Operating Engineers ("Local 542" or the "Union"), the Joint Apprenticeship Training and Safety Committee ("JATC"), and the contractors and contractor associations that entered into collective bargaining agreements with Local 542.

On January 2, 1979, the court[1] issued its decision that minorities, as a class, had been victims of intentional racial discrimination by Local 542 and the JATC by the denial to minorities of equal treatment in entry to the union and to minority members of the Union in obtaining referrals to jobs, in violation of Title VII, 42 U.S.C. §2000e *et seq*. and 42 U.S.C. §1981. *Commonwealth of Pennsylvania v. Local Union 542*, 469 F.Supp. 329 (E.D. Pa. 1978) (liability opinion), *aff'd as to Local 542*, 648 F.2d 922 (3d Cir. 1981).[2] The court also held that the contractor associations and contractors were liable under 42 U.S.C. §1981 because of their contractual relationship to the Union hiring hall. *Id*. The court's finding of vicarious liability on the part of the contractor associations and contractors was reversed by the United States Supreme Court. *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982).

On November 7, 1979, the court issued an injunction, called a "Judgment and Decree" (the "Decree"), which prohibited any further discrimination by Local 542 and the JATC.[3] That injunction also set specific minority goals, spread over five years, to bring about racial integration in the operating engineers trade and equal employment opportunities for those minorities who are or wish to become members or affiliates of Local 542 and the

1. United States District Judge A. Leon Higginbotham was the judge assigned to the case until December 7, 1979 when it was transferred to United States District Judge Louis C. Bechtle by reason of the elevation of Judge Higginbotham to the United States Court of Appeals for the Third Circuit.

2. The court's liability opinion was actually filed on November 30, 1978, but was impounded until January 2, 1979 in hopes of maximizing the chances for settlement.

3. The Judgment and Decree was actually filed on August 8, 1979. In the hope of fostering a settlement, the court impounded the Judgment and Decree and didn't release it until November 7, 1979. *See Commonwealth of Pennsylvania v. Local Union 542*, 488 F.Supp. 988 (E.D. Pa. 1980), where the court explains the impoundment and settlement process and elucidates the purpose and basis of the August 8, 1979 Judgment and Decree. The Judgment and Decree was revised on August 12, 1983 (Post Decree Order #73), which has become the operative document in this action. All references to the Judgment and Decree in this opinion shall be to the revised Decree found in Post Decree Order #73.

JATC. *Commonwealth of Pennsylvania v. Local Union 542*, 502 F.Supp. 7 (E.D. Pa. 1979). The hour and wage percentage goals for the five-year duration of the Decree were as follows:

	1st year	2nd year	3rd year	4th year	5th year
District 1	12 %	14 %	16 %	18 %	18 %
District 2	1.1%	1.3%	1.3%	1.3%	1.3%
District 3	.5%	.7%	.7%	.7%	.7%
District 4	2 %	2.6%	2.8%	2.8%	2.8%
District 5	8 %	10 %	12 %	12.4%	12.4%

Following a series of hearings in March, April and May 1985, before the Special Master,[4] a report was submitted to the court by the Master concerning Local 542's compliance with the Decree during years 4 and 5, and making recommendations concerning extending the Decree. Having thoroughly reviewed the Master's report and having had a hearing and heard argument from all parties on July 30, 1985, the court finds that the Masters' findings are not clearly erroneous. That is to say, the court concludes that the Master heard and considered all of the evidence and arguments offered by the parties and made thoughtful, reasonable and proper findings of fact. The Master was totally justified in accepting the facts and figures in the plaintiffs' testimony and exhibits as being accurate and as a basis for recommendations to the court. The court accordingly accepts essentially what the Master states in his report, including the history of the case, recall features, statistical presentations, etc., and hereby adopts the following findings and conclusions:

II. FINDINGS AND CONCLUSIONS

1. There has been a serious shortfall in wages and hours for minorities required by the Decree in District 1 and District 5 for years four and five, to wit:

4. On March 25, 1980 Judge Louis C. Bechtle appointed, pursuant to Fed. R. Civ. P. 53, Frank W. Jenkins, Esquire, as Special Master for the purpose and for the reasons set forth in the Court's Order of appointment.

	District 1		District 5	
	4th year	5th* year	4th year	5th* year
Applicable Goal Under Decree	18.0%	18.0%	12.4%	12.4%
Actual Minority %	12.1%	13.43%	8.0%	10.10%

* September 1984 — May 1985

This represents a total wage shortfall for the two districts in years four and five combined of approximately $4,101,707.00.

2. The wages and hours goals for years four and five could have been met.

3. In Post Decree Order #78 the court ordered an increase in referrals[5] of minorities to jobs in order to rectify an apparent inability to achieve the necessary hours and wages for minorities. Thereafter, minority referrals in District 1 were to be at the rate

5. It is essential to an understanding of this opinion that the special terms "referral", "dispatch" and "recall" be defined as they have been used and will be used in the context of this case. " Referrals" are composed of "dispatches" and "recalls."

A "dispatch" (also referred to as "*hiring hall* dispatch" for clarity and emphasis) is an internal feature of the hiring hall in which Union members are "dispatched" to prospective employers based solely on the Union member's position on the out-of-work list. Hiring hall dispatches are under the exclusive control of the Union.

A "recall" (also referred to as "*employer* recall" for clarity and emphasis), on the other hand, is a feature of the employer/employee relationship as found in the collective bargaining agreement. The employer recall provision allows the employer to recall (but it must be through the Union hiring hall) any Union employee laid off within the preceding ninety (90) calendar days. Because, at least on the surface, employer recalls are initiated by the employer, employer recalls are under the control of the employer, not the Union.

In Post Decree Order #80 the court defined referral, for purposes of this Decree, as including:

> [A]ll [hiring hall] dispatches by the union members which result in offers of employment from an employer-contractor, regardless of whether the minority union member accepts the offer of employment. "Referral" does *not* include an unsuccessful [dispatch] attempt by the union to contact a minority union member regarding a possible employment. A[n] [employer] recall by a contractor-employer shall be considered a "referral" for purposes of this Decree.

of 40 percent of all referrals to achieve the wages and hours goal for year five, that goal being 18 percent. Since the issuance of Post Decree Order #78, however, the actual referrals to minorities has actually *decreased* to 26.5 percent in year 5 from 27.47 percent in year 4. There were, in fact, enough minority operators on the out-of-work list at the Union's hiring hall available so that 40 percent of all referrals could have been to minorities. Had 40 percent of all referrals gone to minorities, there was at least a chance that the 18 percent of hours and wages could have been met.[6]

4. The court finds that the employer recall provision found in the collective bargaining agreement has had, and will continue to have, a material adverse impact on the Union's ability to meet the referral goals, and therefore the wages and hours goals of the Decree. In District 1, for example, in the period from July 30, 1984, through July 26, 1985, there was a total of only 27.06 percent minority referrals (i.e., dispatches and recalls) — well below the court mandated 40 percent. Employer recalls made up 53 percent of all referrals, the remaining 47 percent being hiring hall dispatches. Of all employer recalls, only 13.3 percent were to minorities. Consequently, the percentage of minority hiring hall dispatches (42.5%) was so adversely affected by the percentage of minority employer recalls (13.3%) that the sum total minority referrals was only 27.06 percent. In other words, without the employer recall feature, the Union would have met the court mandated 40 percent minority referrals for District 1. Clearly, the recall provision in the collective bargaining agreement is a major obstacle to the Union's ability to meet the goals of the Decree, thereby encroaching into the minorities opportunity for hours worked to an unacceptable degree.

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6. There is not a direct correlation between the percentage of minority referrals and the percentage of minority wages and hours. Forty percent minority referrals will not result in 40 percent minority wages and hours. This is because of the nature of the work assigned, i.e., different durations of employment, skill qualifications, etc. The court has found that in District 1, for example, 40 percent minority referrals is necessary to meet the ultimate goal of 18 percent minority hours and wages. There is a similar pattern in the other districts.

The power of this court to alter provisions in the collective bargaining agreement which effect the ability of the Union to comply with the Judgment and Decree was specifically upheld by the Supreme Court *in this very case* in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). Justice Rehnquist clearly defined the district court's remedial powers:

> To the extent that the remedy properly imposed upon the Union and the JATC requires any adjustment in the collective bargaining contract between [the employers] and the Union, *it is entirely appropriate for the District Court to fashion its injunctive remedy to so provide*, and to have that remedy run against . . . the Union and the JATC.

458 U.S. at 400 (emphasis added).

In reference to the referral system *in this very case*, the Third Circuit recently stated:

> Here, *where the referral system itself was the mechanism for intentional discrimination*, there is no bona fide seniority system, and therefore there are no legitimate expectations based on the referral system. Where a seniority system has been maintained with discriminatory intent, those individuals who gain seniority within the system are direct, intentional beneficiaries of the illegal discrimination; their "*expectations are therefore illegitimate, and do not warrant protection*."

Commonwealth of Pennsylvania v. Local Union 542, No. 84-1614, slip op. at 12-13 (3d Cir. July 17, 1985) (emphasis added).

In light of this court's finding that the employer recall provision of the collective bargaining agreement is an obstacle, from all vantage points, to compliance with the Judgment and Decree, and because the reasons given for the need of a ninety-day recall period are obscure and in any event substantially outweighed by the interference it poses to the court's Decree, the ninety (90) day recall rule could be removed entirely, but for the time being will be reduced to thirty (30) days. Hereafter, an employer may

only recall an employee laid off within the preceding thirty (30) calendar days, notwithstanding *any* provision in any collective bargaining agreement to the contrary. The court anticipates that this will increase the percentage of total minority referrals. After a satisfactory period of time, the court will re-evaluate the affect the thirty (30) day employer recall rule is having on the Union's ability to meet the goals of the Decree and, if necessary, make further adjustments to this provision of the collective bargaining agreement.

5. The union was given five years in which to prove to this court that it could operate the hiring hall in a non-discriminatory, fair and equitable manner. The court finds that the union has failed in this regard and to the contrary, has continued to use the hiring hall as a tool of discrimination, albeit at a reduced level, but discrimination nevertheless. For this reason, the court will appoint a full-time Hiring Hall Monitor, directly responsible to the Court, who will be given full authority to operate and oversee all features of the hiring hall. In accordance with Fed. R. Civ. P. 53, the compensation to be allowed to the Hiring Hall Monitor shall be fixed by the court and shall be paid by Local 542.

6. Paragraph 19(a) of the Judgment and Decree (as revised) provides:

> Defendant Local 542 shall develop and present to the Court for approval valid, job-related criteria for admission to the union for each method of entry through which membership can be attained, including affiliation via the Registrant Program. Validation shall be, to the extent feasible, in accordance with the "Uniform Guidelines on Employee Selection Procedures" as promulgated by the Equal Employment Opportunity Commission on August 25, 1978, 43 Fed. Reg. No. 166, at 38290 *et seq*. The Plaintiffs shall have the opportunity to present their position on the legality and validity of any of these proposed criteria.

Paragraph 34 of the Judgment and Decree (as revised) provides, in pertinent part:

> The Defendants shall develop, adopt and implement non-discriminatory and job-related standards for the positions of master and assistant master mechanics. Once developed, these standards shall be submitted to the Court for approval, with prior submission to Plaintiffs for their comments, or objections if any.

Post Decree Order #81, issued on September 27, 1984, ordered:

> It is also ordered that defendants complete and submit to plaintiffs and the court, within thirty (30) days of the date of this Order, the remaining validation project with respect to each of the methods of entry into the union as well as any additional work to be completed on the master and assistant master mechanic validation report.

Local 542, in blatant and confrontational contempt of these court mandates, has failed to do *any* of the validation work required of it. This court no longer believes the union is willing to make, or to even try to make any measurable effort to develop a satisfactory validation plan. Consequently, the court concludes that the Union has forfeited its opportunity to develop and submit validation material of its own, and by the accompanying order, will appoint Dr. Felix Lopez to enter upon and complete a validation plan, subject to the approval of this court. Dr. Lopez's fees will be paid by the Union.

7. It is evident that Local 542 has not met many of the goals of the Judgment and Decree. Therefore, the court will hold defendants in contempt for failing to satisfy court mandates respecting work levels for minorities, as well as its failure to do the validation work. The Union's performance cannot be excused because the figures show improvement. The degree of improvement is patently and substantilly out of proportion to the levels of compliance that *could* have been achieved with the resources and experience, and time allowed by the court to perform. The Union's efforts have been mediocre, lackluster and, in the

Court's view, calculated to show the minimum of change at the least cost to the Union's continuous program of wearisome and intentional racial discrimination.

In accordance with the above, an appropriate Modification Decree will be entered.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, *et al.*	:	CIVIL ACTION
v.	:	
LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*	:	NO. 71-2698

MODIFICATION DECREE

f

I. *Duration and Effective Date*

1. The Judgment and Decree (as revised) is extended, in all five (5) districts, for two (2) years, beginning on September 1, 1985. The provisions of this Modification Decree are effective immediately. The Judgment and Decree as modified by this Modification Decree shall terminate on August 31, 1987, unless, prior to that date, good cause is shown for an extension of any provisions of the Decree or for their earlier termination.

II. *Goals*

2. It shall be the goal of this Decree that the number of hours worked by minorities equal the percentages of the total hours worked in each district and in each year as set out below:

	Year 6 (Sept. 1, 1985 to Aug. 31, 1986	Year 7 Sept. 1, 1986 to Aug. 31, 1987)
District 1	18 %	18 %
District 2	1.3%	1.3%
District 3	.7%	.7%
District 4	2.8%	2.8%
District 5	12.4%	12.4%

III. *Referrals*

3. Post Decree Order #78 is to remain in effect for the duratin of the decree, to wit, 40 percent of all referrals are to go to minorities in District 1, and 17 percent of all referrals are to go to minorities in District 5.

IV. Recall Provision

4. In light of the court's finding that the employer recall provision in the collective bargaining agreement has had, and will continue to have a material adverse impact on the Union's ability to meet the goals of the Decree, the ninety (90) day recall rule found in the collective bargaining agreement will be reduced to thirty (30) days. An employer may only recall an employee laid off within the preceding thirty (30) calendar days, notwithstanding any provision in the collective bargaining agreement to the contrary, unless specifically authorized by the Hiring Hall Monitor.

V. Hiring Hall Monitor

5. Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the court shall designate a full-time Hiring Hall Monitor, to be paid at Local 542's expense, with full authority to operate and oversee *all* features of the hiring halls in the five districts.

6. The Hiring Hall Monitor, in addition to his primary authority to oversee all five districts, shall be responsible for running the day to day operations of the hiring hall in District 1, the district with the greatest number of minorities. The Hiring Hall Monitor is authorized to appoint hiring hall leaders to run the day to day operations in the hiring halls in the remaining four districts, all of whom are directly responsible to the Hiring Hall Monitor.

7. The Hiring Hall Monitor will have the authority to approve of or disapprove of all referrals, including hiring hall dispatches and employer recalls. The Hiring Hall Monitor's

authority to approve a recall request by an employer which extends beyond the thirty (30) day recall period set by this Decree, shall be limited to "truly extraordinary circumstances."

8. The parties are to convene together with the Hiring Hall Monitor to identify with particularity what the court envisions to be a very few "truly extraordinary circumstances" which would justify such an exception to the thirty (30) day rule. The Hiring Hall Monitor is to submit these guidelines in writing to the court within ninety (90) days of the date of this Modification Decree.

9. The Hiring Hall Monitor shall submit to the Master bimonthly reports with copies to counsel for all parties, setting forth sufficient information regarding referrals, including a breakdown of minority hiring hall dispatches and employer recalls for the previous two month period.

10. A separate Post Decree Order will be entered appointing the Hiring Hall Monitor, summarizing his/her qualifications for this position, and setting forth the compensation he/she is to be paid.

VI. Validation

11. In light of the court's finding defendants in contempt of paragraphs 19(a) and 34 of the Judgment and Decree (as revised) and Post Decree Order #81, pursuant to Fed. R. Civ. P. 53, the court hereby appoints, at defendants' expense, Felix Manual Lopez, Ph.D., to enter upon and complete a validation plan with respect to each of the methods of entry into the Union as well as developing non-discriminatory, job-related standards for the positions of master and assistant master mechanics.

12. Dr. Lopez is to submit to the court within 60 days of the date of this Modification Decree, a proposed plan to enter upon and complete the validation plan.

13. Once the validation plan is developed it shall be submitted to the court for approval, with prior submission to both plaintiffs and defendants for their comments, or objections, if any.

14. A separate Post Decree Order will be entered summarizing Dr. Lopez's qualifications for this position, and setting forth the compensation he is to be paid.

VIII. The Role of the Master

15. In light of the court's appointment of a Hiring Hall Monitor to oversee the day to day operations of the hiring hall referral system the Master is directed to shift his emphasis to the Training and Upgrading Program. Nonetheless, the master retains all authority given to him under the Judgment and Decree (as revised). To the extent the authority and duties of the Master and Hiring Hall Monitor overlap or conflict, they are authorized to mutually resolve such conflicts. A written explanation of such resolutions are to be forwarded to the court, with a copy sent to counsel for all parties.

VIII. Training and Upgrading Program

16. The court has received the Master's report on the Training and Upgrading Program ("Program") and has taken the Master's recommendations under advisement. The court will issue a separate Post Decree Order modifying the Program if it finds it necessary to do so. In the interim, the Program is to continue unmodified for the duration of the Decree.

IX. Effect of Modification Decree on Judgment and Decree

17. All provisions of the Judgment and Decree (as revised) not inconsistent with this Modification Decree shall remain in force.

BY THE COURT:

_____

Dated: October 9, 1985